Faurecia Exhaust Systems, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B. Cases 8–CA–37192, 8–CA–37229, and 8–CA–37354

August 26, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On April 2, 2008, Administrative Law Judge Ira Sandron issued a decision, finding that the Respondent violated Section 8(a)(3) and (1) by suspending and warning employee Marvin Blue because he asked coworkers to obtain for him the names, addresses, and telephone numbers of unit employees, for use in a union organizing campaign. On September 30, 2008, the Board issued a Decision and Order Remanding this finding to the judge for clarification and further consideration of the 8(a)(3) allegation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[1]

On October 30, 2008, the judge issued the attached Supplemental Decision reaffirming his finding that Blue was disciplined in violation of Section 8(a)(3). The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order in the Supplemental Decision.

As set forth more fully in the judge's decisions, Blue began soliciting employees to support the Union's organizing efforts in December 2006. The Respondent immediately learned of Blue's union activity, as evidenced by management emails stating that "[i]t was more of the same from [Blue]," that he had approached another employee about the union, and that "the conversation about unionization is now becoming an open conversation." Those emails also discussed the need to investigate alleged employee complaints that Blue was "call[ing] and harass[ing . . . them] while pushing the praises of the [Union]."

Blue continued to engage in union activity in April 2007, by asking gap leaders Jennifer Samples and "Meechy" to obtain the names, addresses, and phone numbers of employees (contact information) who could be solicited to support the Union.[3] Samples reported Blue's request to Plant Manager Jack Caccioppo, who suspended Blue on May 11, pending an investigation.

On May 16, Blue was recalled from suspension to a meeting with Caccioppo and Human Relations Director John Plenzler, where he was informed of the results of the investigation. Plenzler told Blue that he had violated three policies in the Employer handbook: the policy prohibiting Harassment/Sexual Harassment, the Productive Work Environment Policy, and a policy entitled, "Personnel Records." Plenzler told Blue that the first two policies "prohibit harassment, including misconduct which is pervasive and/or disrupts the work environment . . . [and y]ou violated these policies when you persistently and improperly pressured a number of other employees to provide to you lists of employee names and phone numbers." With respect to the Personnel Records policy, Plenzler told Blue that this "protects the confidentiality of employee records. You have no right to such information from company records, and your actions threatened the privacy of your fellow employees as well as company policy."

The managers ended the meeting by warning Blue that further violations of these handbook policies would result in discipline, including possible discharge. Blue did not lose pay or benefits as a result of his suspension, and he returned to work the next day.

As recounted in our Decision and Order Remanding, the judge applied *Wright Line*[4] and found that the General Counsel established a prima facie case that the Respondent violated Section 8(a)(3) and (1) by suspending and warning Blue for requesting employee contact information from gap leaders Samples and Meechy. 353 NLRB at 383. The Respondent's defense was that Blue's conduct was not protected by Section 7, making his discipline lawful.

[1] *Faurecia Exhaust Systems*, 353 NLRB 382, 384 (2008). Having carefully considered the matter, we reaffirm the earlier decision to remand this issue to the judge for further consideration.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 2007, unless otherwise indicated.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The judge rejected the Respondent's defense on two grounds. First, he found that Blue's request for the employees' contact information was protected. Alternatively, he found that "[e]ven assuming arguendo" that Blue's conduct was unprotected, his discipline was still unlawful because it was motivated "in substantial part" by his union solicitations in December 2006, which were "undeniably protected." In his supplemental decision on remand, the judge clarified his alternative rationale, stating that he rejected the Respondent's *Wright Line* defense as pretextual.

We agree with the judge's rationales for rejecting the Respondent's *Wright Line* defense. First, on the issue of whether Blue's conduct was protected, the Board has held that employees are protected in requesting information that is relevant to organizational purposes, even if the employer contends it is confidential. See *Mast Advertising & Publishing, Inc.*, 304 NLRB 819, 828 (1991). By contrast, where the information is surreptitiously taken, the employee conduct is unprotected. *Ridgely Mfg. Co.,* 207 NLRB 193, 197 (1973).

Blue's conduct was plainly protected under that precedent. He merely requested, and did not surreptitiously take, the contact information of unit employees. We reject the Respondent's argument that, by directing his request to "fellow hourly employees" Samples and Meechy, and "bypass[ing] management" officials who had the actual authority to grant his request for the contact information, Blue's conduct was "sneaky," surreptitious, and, hence, unprotected. As noted by the judge, Blue explained that he asked Samples and Meechy for the contact information because, as gap leaders, they "had access, in the regular course of their duties, to the office in which the records were kept." Further, there is no evidence that Blue asked Samples and Meechy to misappropriate the contact information or to obtain the records by disregarding any policy set forth in the Respondent's employee handbook.

We conclude, therefore, in agreement with the judge, that Blue's request for unit employees' contact information, addressed to those whom he reasonably believed handled such requests, was protected by Section 7. Consequently, Blue's request cannot serve as a legitimate basis for the Respondent's *Wright Line* defense. See generally *Bowling Transportation, Inc.,* 336 NLRB 393, 395 (2001) ("An affirmative defense under *Wright Line* must be based on a lawful, legitimate reason for the challenged employment decision."), enfd. 352 F.3d 274 (6th Cir. 2003), rehearing en banc denied (Mar. 15, 2004).

We further agree with the judge's alternative finding that, even assuming that Blue's request for the contact information was unprotected, the Respondent's asserted reliance on that request as the basis for Blue's suspension was a pretext. As reflected in the internal management emails discussed above, and the record, the Respondent was alarmed by Blue's December 2006 union solicitations, and believed he had resumed that activity in May 2007. The Respondent does not except to the judge's finding that it harbored animus against Blue's soliciting activity, and we agree with the judge that it was this activity, rather than any purported concern over handbook policy violations, that caused the Respondent to discipline Blue.

In rejecting as pretextual the Respondent's defense that it disciplined Blue for violating its handbook policies, we rely particularly on the judge's finding that the Respondent failed to show that Blue violated its harassment/sexual harassment policy. No employees, including Samples and Meechy, testified that Blue harassed them in requesting contact information. Further, the judge credited Blue that he "merely asked" the gap leaders for the information—"conduct which can hardly be deemed to amount to 'harassment' under any reasonable construction of the term." Thus, rather than rebut the General Counsel's prima facie showing that Blue was disciplined in violation of Section 8(a)(3), the Respondent's proffer of pretextual reasons for the discipline constitutes additional proof that his discipline was unlawful. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).[5]

In sum, we affirm the judge's finding, for the reasons set forth above, that the Respondent has failed to sustain its *Wright Line* rebuttal defense that it would have disciplined Blue in the absence of his union soliciting activity. Accordingly, we adopt the judge's finding the Respondent violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge in his supplemental decision and orders that the Respondent,

[5] In adopting the judge's finding that the Respondent's *Wright Line* defense was pretextual, we do not rely on the factors of disparate treatment and inadequate investigation. Contrary to the judge, we find no evidence that Blue was disparately disciplined; nor does the evidence establish that the Respondent suspended him without adequately apprising him of the alleged employee complaints against him and affording him an opportunity to respond.

Faurecia Exhaust Systems, Inc., Toledo, Ohio, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Dated, Washington, D.C. August 26, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Rudra Choudhury, Esq., for the General Counsel.
Michael A. Snapper and *Keith J. Brodie, Esqs. (Barnes & Thornburg LLP),* of Grand Rapids, Michigan, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. I issued a decision in this matter on April 2, 2008. In 353 NLRB 382 (2008), the Board remanded the case to me regarding Marvin Blue's May 11, 2007 suspension and May 16, 2007 written warning,[1] which I found violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Board determined that my analysis regarding the General Counsel's satisfaction of his initial burden under *Wright Line*[2] was clear, but my *Wright Line* analysis in rejecting Respondent's rebuttal defense was not ("Specifically, we cannot discern whether it is based on a dual-motivation analysis or a pretext finding." Ibid at 385.). Thus, the Board remanded the case for the following sole and limited purpose:

> [T]he judge should explain which analytical framework under *Wright Line* he meant to apply [as to the second prong of *Wright Line*], reanalyze the 8(a)(3) allegation under that analysis, and specify the evidence relied on in reaching that conclusion.

I will address only aspects of the case pertinent to the remand.

Credibility

Respondent did not elicit testimony from any individuals whom Blue allegedly "harassed" by asking them to obtain employee information for the Union. Notably, one of those persons was gap leader Jennifer Samples, whom Respondent called as a witness. She testified about other matters but was asked no questions on this subject. Although I concluded that Samples was not a statutory supervisor, she had firsthand knowledge of the incidents on which Respondent based the imposition of discipline on Blue, and she would have been reasonably expected to testify for Respondent about them. Her failure to do so raised the suspicion that her testimony would have been unfavorable to Respondent, and I therefore drew an adverse inference against Respondent on this issue. See *Palagonia Bakery Co.*, 339 NLRB 515, 538 (2003); *Dalikichi Sushi*, 335 NLRB 622, 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F.3d 730 (6th Cir. 1988).

Blue was generally credible and consistent, and I credited his unrebutted testimony regarding the scope and nature of his activities.

Facts

When Blue worked for a previous employer, he served as a shop steward for the Charging Party-Union (the Union). He has been a welder for Respondent since June 2006, with Production Supervisor Jeff Lovejoy his immediate supervisor at all times. In about October or November 2006, the Union contacted Blue about organizing Respondent's employees, and at around that time, he first talked to coworkers on the subject.

The facts set out in the following two paragraphs are based on Blue's unrebutted and credible testimony.

In early 2007, Blue had a conversation in the parking lot with Samples and welder Eric Taylor, prior to the beginning of the shift. Blue stated that he sometimes thought the employees needed a union. Samples replied that if Site Manager Jack Caccioppo heard him talk about unions, he could get terminated.

In early April, the Union asked Blue to obtain employees' names and phone numbers. Later that month, Blue asked "Meechy," the night-shift gap leader (whom Respondent no longer employs), if he could get such information for Blue to pass on to the Union. Meechy said that he would try. On or about May 9, Blue, in a telephone conversation, made the same request to Samples, who also replied that she would try. He testified that he asked them because he trusted them and believed they had access to the information; to wit, in the regular course of their duties as gap leaders, they spent time in the supervisors' office.

On the morning of May 11, at the conclusion of his morning break, Blue was called to a meeting in the conference room with Caccioppo, Lovejoy, and Quality Engineer Bryan Kennedy. Caccioppo stated that Blue was suspended until further notice, for violating company policy by harassing people for names and phone numbers. Caccioppo gave no specifics, and Blue denied any wrongdoing.

On the morning of May 16, Lovejoy called Blue and told him to come to a meeting in the conference room that afternoon. Blue did so. Present were Caccioppo and Lovejoy, with Human Resources (HR) Manager John Plenzler participating by conference call.

Plenzler read Blue verbatim the contents of General Counsel's Exhibit 14, a memo dated May 16, 2007, from Plenzler to Blue, and signed by Plenzler and Caccioppo. The memo states that management had received complaints regarding Blue's

[1] All dates hereinafter occurred in 2007, unless otherwise specified.
[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

behavior and the requests he made of other employees for employee lists and phone numbers. The matter was fully investigated and the determination made that Blue had violated the following provisions of the handbook when he "persistently and improperly pressured a number of other employees to provide . . . lists of employee names and phone numbers": Section 1.2–harassment/sexual harassment, and section 1.3–productive work environment.

Relevant portions of those sections are:

> 1.2–Harassment/Sexual Harassment; the opening paragraph states that the Company "has established a strict policy prohibiting unlawful harassment (racial, national origin, color, disability, religious, age, sexual, sexual orientation) of employees, including implied or expressed forms of sexual harassment. . . ."
>
> 1.3–Production Work Environment Policy; in particular, "Any behavior that causes an intimidating, threatening or unsafe environment is unacceptable. Examples of unacceptable behavior may include the use of profanity, gossip, and/or the spreading of rumors, physical intimidation, creation of unsafe conditions and mental harassment."

Plenzler further stated that Blue's "attempts to obtain employee phone numbers was an attempt to violate Section 1.10 of the handbook, which protects the confidentiality of employee records. You have no right to such information from company records, and your actions threatened the privacy of your fellow employees as well as company policy."

Section 1.10 relates to personnel records. The relevant paragraph states, "Your personnel record is considered confidential. Other than verification of employment, personnel information will not be released to outside parties without your permission. . . ."

Plenzler warned Blue that any further violation of those policies would subject him to discipline up to and including termination, asked him to sign the memo, and stated he would have his job back. Blue signed it. I credit Blue's unrebutted testimony that he then said he wanted it on record that he supported the Union and knew his rights, and Plenzler acknowledged there was "activity" in December 2006 and January, of which Blue was part. Plenzler told Blue that he could return to work the following day and would be paid for the time he was suspended. Blue lost no pay or other benefits as a result of the suspension.

The parties stipulated that General Counsel's Exhibit 18 is comprised of the only documents that Respondent furnished in response to the following portion of the General Counsel's subpoena duces tecum: all employees at the facility who were disciplined for harassment and/or sexual harassment during the period from July 26, 2005–July 26, 2007.

Those documents show that only one employee other than Blue has been disciplined for such reason: Matt Kirshner, who in October 2006 received a 1-day suspension for making racist remarks to other employees. Respondent provided no documentation that it has disciplined anyone other than Blue for misconduct pertaining to the work environment or confidentiality of employee records.

The parties stipulated that management knew of Blue's union activities beginning on about December 13, 2006. An email of that date from HR Manager Plenzler referred to Blue's "persistence" in talking to other employees about the Union, and reflected management's concern over this.[3]

Soon afterward, Plenzler, by email dated December 19, 2006, directed supervisors to investigate the "complaints" against Blue.[4] In that email, he also stated that "I would like to finalize a date to meet with the workforce regarding our Union Free Policy as this is heating up quickly."

On May 3, 2007, just 8 days before Blue's suspension, Plenzler sent an email to Caccioppo entitled "Union Activity," in which he discussed reports of (unnamed) employees soliciting support for the Union and expressed his opinion that "the union is coming after us in strength."[5]

In an email dated May 15, 2007, after Blue's suspension, Caccioppo advised Plenzler that regarding the third shift, Blue had been "very pro-Union in his discussions and comments all the time" with one employee but had not asked him for any information.[6]

Finally, Supervisor Eric Plenzler, in an email dated July 27, 2007, to Supervisors Lovejoy and Tonia Carter, stated that a change in labeling employee lockers "may not be a good idea with all of the union stuff going on. Marv [Blue] has already been disciplined for trying to get the names of all of the hourly people, why should we make it easier for him to obtain this information?"[7]

Analysis and Conclusions

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line.* Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus. The Board did not take issue with my analysis in concluding that the General Counsel established a prima facie case, and I will not repeat it here.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399−403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *SPO Good-Nite Inn, LLC,* 352 NLRB 268 (2008); *Serrano Painting*, 332 NLRB 1363, 1366 (2000).

[3] See GC Exh. 5 at 1. See also GC Exh. 6.
[4] GC Exh. 7.
[5] GC Exh. 8.
[6] GC Exh. 9.
[7] GC Exh. 13 at 2.

As the Board stated in its remand, if the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not in fact relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. *SPO Good-Nite Inn, LLC,* supra. On the other hand, further analysis is required if the defense is one of "dual motivation," i.e., the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 323, 223 (D.C. Cir. 2006).

For the following reasons, I conclude that Respondent's defenses were a pretext and fail on that basis.

A series of internal company emails going back as far as December 2006 demonstrate Respondent's ongoing hostility toward Blue for his solicitation of coworkers to support the Union, as well as surveillance of his union activities.

Respondent failed to offer any direct evidence in the way of testimony from purported complainants, even one who testified at the trial on other matters. Respondent therefore failed to rebut Blue's credited testimony that he merely asked two gap leaders for employees' names and phone numbers with the avowed purpose of passing the information on to the Union—conduct which can hardly be deemed to amount to "harassment" under any reasonable construction of the term.

Respondent's harassment/sexual harassment policy addresses "unlawful harassment (racial, national origin, color, disability, religious, age, sexual, sexual orientation) of employees, including implied or expressed forms of sexual harassment. . . ." Blue's conduct did not fit within any of these categories. Thus, during the 2-year period from July 26, 2005–July 26, 2007, Respondent disciplined only one other employee for violating its harassment/ sexual harassment policy, and that was for making racist remarks. The record further reflects that no employee other than Blue has been disciplined for breaching either Respondent's confidentiality or work environment policies.

Respondent issued Blue a suspension without providing him the specifics of the allegations against him or affording him an opportunity to respond. This leads to the conclusion that management was not genuinely interested in what actually happened but was instead using alleged violations of company policy as a pretext. See *Diamond Electrical Mfg. Corp.*, 346 NLRB 857, 861 (2006); *Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004), enfd. mem. 162 Fed. App. 541 (6th Cir. 2006). The written warning that followed the suspension must be considered part of the same chain of events and, by analogy to the "fruit of the poisoned tree" principle, was also tainted.

Accordingly, I conclude that Respondent would not have suspended Blue on May 11, or issued him a written warning on May 16, in the absence of his protected union activity, and that such adverse actions therefore violated Section 8(a)(3) and (1) of the Act.

ORDER

The Respondent, Faurecia Exhaust Systems, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warnings to, suspending, or otherwise disciplining employees because they engage in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any references to the May 11, 2007 suspension, and the May 16, 2007 written warning, issued to Marvin Blue, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and warning will not be used in any way against him.

(b) Within 14 days after service by the Region, post at its facility at Toledo, Ohio, copies of the attached notice marked "Appendix"[8] Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 30, 2008.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT issue you written warnings, suspend you, or otherwise discipline you because you engage in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL remove from our files any reference to the unlawful suspension and warning of Marvin Blue, and within 3 days thereafter notify him in writing that this has been done and that the suspension and warning will not be used against him in any way.

FAURECIA EXHAUST SYSTEMS, INC.